HIGH COURT OF AUSTRALIA

STEWARD J

PLAINTIFF S52/2025A & ANOR — PLAINTIFFS

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP — DEFENDANT

[2025] HCASJ 27
Date of Judgment: 1 September 2025
S52 of 2025

ORDERS

1. *The application of 1 May 2025 for a constitutional or other writ is summarily dismissed as an abuse of process pursuant to rr 25.09.3(b) and 28.01.2(c) of the High Court Rules 2004 (Cth).*

2. *The name of the defendant is amended from "Minister for Immigration and Multicultural Affairs" to "Minister for Immigration and Citizenship".*

3. *The plaintiff pay the defendant's costs of and incidental to the application.*

Representation

The plaintiffs are represented by Residency Legal

The defendant is represented by Australian Government Solicitor

1 STEWARD J. This is an application for a constitutional or other writ, by which the plaintiffs seek judicial review of a decision[1] by a delegate of the Minister for Immigration and Multicultural Affairs (the "Minister"), refusing an application by the plaintiffs for Protection (subclass 866) visas under s 65 of the *Migration Act 1958* (Cth) ("Migration Act").

Background

2 The plaintiffs are married and are both citizens of Nepal. They assert that their marriage is "intercaste". On 16 December 2024 they lodged an application for Protection visas which was ultimately refused on 14 March 2025. The first plaintiff is the wife, who was the "main applicant" in the visa application; the second plaintiff is the husband, who was identified as a "member of the same family unit" in the visa application.

3 In the visa application, the plaintiffs explained that their reason for seeking Protection visas in Australia was that they feared harm from their families, including physical violence, if they returned to Nepal, due to their intercaste marriage.

4 An officer of the Department of Home Affairs (the "Department") requested more information to assess the plaintiffs' application for Protection visas pursuant to s 56 of the Migration Act. The request comprised a letter, which was sent by email to the first plaintiff dated 10 February 2025, inviting the plaintiffs to "provide further information about your claims" including details about their intercaste marriage and any previous harm or threats of harm they had experienced. It also asked them to explain why it would be unreasonable for them to relocate to another city in Nepal and why they had apparently delayed applying for Protection visas (in circumstances where the first plaintiff had arrived in Australia on 19 July 2015, but did not lodge the visa application until 16 December 2024).

5 The letter also advised the plaintiffs that they had "28 days starting on the day after we emailed this request" to provide more information (ie, a due date of 10 March 2025). It explained "[i]f you do not send us the information we need within the time we have given you, we can decide the application with the information we have at that time without asking you again" and advised that if the plaintiffs needed to get any information from another organisation, they would need to ask them for the information before the due date and provide the Department with evidence that they had asked by that time.

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1 The plaintiff's application is expressed to seek judicial review in respect of "the decision" of the delegate on 14 March 2025. As explained below, the delegate in fact made two separate (but closely related) decisions on 14 March 2025.

6 In the early morning on 13 March 2025, the first plaintiff sent two (identical) emails to the Department in which she said that she needed more time to respond to the request and asked for an "additional 28 days to provide the documents request[ed]". Later that day, an officer of the Department sent an email in response to the first plaintiff, explaining that they could not provide an extension in the circumstances. The email relevantly said:

> "As per sections 58(4) of the Migration Act and Migration Regulation 2.15(4), an extension can only be granted before the expiry of the original prescribed period for response.
>
> In your case, the prescribed period expired on 10/03/2025 [28 days after s56 request was sent]. As today is 13/03/2025, the prescribed period has expired, and I am unable to grant an extension.
>
> Please note that you are still able to provide information until a decision is made on the application, and any information provided before a decision is made will be considered."

7 On 14 March 2025, a delegate of the Minister made two decisions in respect of the plaintiffs' Protection visa application (ie, one decision for each of the two plaintiffs). The delegate did not accept that either of the applicants were "in an intercaste marriage", nor that they were "harmed or threatened with harm by the families in Nepal on account of their claimed intercaste marriage" based on the information before them. They concluded, in respect of each, that:

> "Due to the delay in lodgement, ... the lack of details in their claims, as well as their lack of evidence, I am not satisfied that their claims are credible."

8 The delegate noted the emails exchanged between the first plaintiff and the officer of the Department on 13 March 2025, and observed that no more information had been provided by the plaintiffs. In their record of decision with respect to the first plaintiff, the delegate said:

> "As of the date of this assessment the applicant has not provided additional information in relation to their claims, I consider that the applicant has been given a reasonable opportunity to provide additional information and evidence to substantiate their claims. As advised in the s56 invitation, I am now proceeding with a decision based on the information before the department."

A similar comment was also made in the record of the decision with respect to the second plaintiff.

9 On 7 April 2025, the plaintiffs filed an application seeking merits review in the Administrative Review Tribunal ("ART") of the delegate's decisions to refuse Protection.

10 On 1 May 2025, the plaintiffs filed in this Court the present application seeking judicial review of the very same decisions.

Ground of application

11 The plaintiffs seek a writ of certiorari quashing the delegate's decisions and a writ of mandamus compelling the Minister to redetermine their visa application. The plaintiffs rely on a single ground for that relief. In substance, they allege that it was "legally unreasonable" for, and "a failure ... to be fair and reasonable" for the delegate to have made their decisions one day after the first plaintiff had requested an extension, in circumstances where, inter alia, the first plaintiff had been told the day before that they could "provide information until a decision is made".

Abuse of process

12 The application for judicial review must be summarily dismissed as an abuse of process. This is because merits review of the delegate's decisions is still available to the plaintiffs.

13 In *Construction Forestry Mining and Energy Union v Director of the Fair Work Building Inspectorate*, Nettle J said:[2]

> "Generally speaking, a litigant must exhaust its statutory rights of appeal before this Court will contemplate an application for mandamus or prohibition directed to achieving a result that in substance may be obtained on appeal. As Gageler J recently observed in *Waters v Federal Court of Australia and the Judges Thereof* [[2015] HCATrans 347 at lines 619-621], it is inappropriate for the original jurisdiction of this Court to be invoked to challenge a decision amenable to appeal, whether or not that appeal is subject to leave."

14 In this case, Pt 5 of the Migration Act relevantly provides inter alia for merits review by the ART of reviewable protection decisions. A "reviewable protection decision" is defined in s 338A(1)(c) to include "a decision to refuse to grant a protection visa" subject to certain exceptions, which are not relevant to this application, and therefore the plaintiffs were entitled to seek ART review of the delegate's decisions. Indeed, as noted above, the plaintiffs have applied to the ART for merits review.

15 In their application to this Court, the plaintiffs explain their decision to apply concurrently for both merits review and for judicial review as follows:

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2 (2016) 91 ALJR 1 at 8-9 [22]; 338 ALR 360 at 367 (footnotes omitted).

> "It is also noted that the plaintiffs are seeking to utilize her right to have judicial review of the matter despite having an option to have merit reviewed by the tribunal first which could be regarded as an abuse of process leading to relief being denied.
>
> The plaintiffs regard it to be fair and reasonable to seek to have the matter properly considered by two decision makers: the original decision maker in the form of the delegate of the defendant and the Tribunal upon review if there is a refusal.
>
> Having denied proper consideration of claim by the original decision maker, it would be unfair for the plaintiffs to only get one actual review of the merit of the case, should she use her merit review right where it is unreasonable for the decision maker to refuse the visa in the given circumstances.
>
> Should the Court find the decision to be unreasonable, the plaintiffs would still be able to have the merit reviewed by both the original decision maker and the tribunal and so justifies an action to seek judicial review over merit review of the matter.
>
> It is submitted that there is no abuse where the decision is unreasonable and deny the plaintiffs its basis right to proper consideration of the application crucial for her."
>
> (Errors in original)

16 These arguments are misguided for two reasons. First, as Gordon J held in *Lam v Minister for Immigration and Border Protection* ("*Lam*"),[3] where an application for merits review is "ongoing and yet to be concluded" (in addition to being "valid on its face" and made within the prescribed time limit) it is "not appropriate" for this Court to determine an application for a constitutional or other writ.[4]

17 Here, the Court has not received a copy of the plaintiffs' application to the ART. However, the plaintiffs, having made that application themselves, plainly must be taken to accept that it is "valid on its face" as in *Lam*. The defendant has also accepted that the ART has jurisdiction to determine that application. It is also apparent from the above arguments advanced by the plaintiffs that the merits review application remains extant in the ART (at least as at the time that their application in this Court was filed). Moreover, in respect of the prescribed time

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3 [2019] HCATrans 174.

4 [2019] HCATrans 174 at lines 55-74.

limit, the application to the ART was required to be made within 28 days of the notification to the applicant of the reviewable protection decision under s 347(3)(b) of the Migration Act. As the delegate's decisions were notified to the plaintiffs on 14 March 2025, they had until 11 April 2025 to make such an application, meaning that their application to the ART on 7 April 2025 was made within the prescribed time limit.

18 It follows that the merits review application was made validly and within the prescribed time limit, and so the ART is required to review it under s 348(1) of the Migration Act. As such, it would not be appropriate for this Court to determine the present application.

19 The second reason that the plaintiffs' arguments must be rejected is that the plaintiffs, just as in *Lam*, do "not, and cannot, identify any fact or matter that might be said to constitute an exceptional circumstance to warrant this Court considering the application without [their] statutory rights of review having been exhausted".[5]

20 The plaintiffs submit that the alleged legal unreasonableness is the "exceptional circumstance" which warrants the present application while the plaintiffs continue to enjoy a statutory right of appeal. In that respect, they also rely on *Minister for Immigration and Citizenship v Li* ("*Li*"), in which this Court found that a decision of the Migration Review Tribunal to refuse the applicant's request for an adjournment to obtain further materials in support of their application for a visa was unreasonable.[6]

21 However, there is no force in this argument. A complaint of legal unreasonableness is not an "exceptional circumstance" that would warrant the intervention of this Court in circumstances where statutory rights of review have not been exhausted. Legal unreasonableness is simply a ground of judicial review and is not sufficient for this Court to supplant the scheme for reviewing decisions under the Migration Act.

22 If the plaintiffs' merits review application is unsuccessful, they may seek judicial review of the ART's decision in the Federal Circuit and Family Court of Australia (Division 2) under Pt 8 of the Migration Act, and thereafter by way of appeal, including ultimately by way of an application for special leave in this Court.

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5 [2019] HCATrans 174 at lines 74-79.

6 (2013) 249 CLR 332.

23 In these circumstances, the plaintiffs' application for a constitutional or other writ is an abuse of process and accordingly, should be summarily dismissed pursuant to rr 25.09.3(b) and 28.01.2(c) of the *High Court Rules 2004* (Cth).

24 In light of my foregoing reasons, it is unnecessary to determine the underlying claim of legal unreasonableness on the part of the delegate.

Disposition

25 The application for a constitutional or other writ should be summarily dismissed with costs.

26 The Minister also sought an order that his name in this proceeding be amended to the "Minister for Immigration and Citizenship" (to reflect the current description of their office). I also make that order.